BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LIGAYA CONNOLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,011,860
FOUR B CORPORATION	)	
d/b/a HEN HOUSE MARKET	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the July 8, 2008, Award entered by Administrative Law Judge Kenneth J. Hursh. The Workers Compensation Board heard oral argument on December 9, 2008.

APPEARANCES

William G. Manson of Kansas City, Missouri, appeared for claimant. Timothy G. Lutz of Overland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a June 16, 2002, accident in which claimant injured her left ankle. In the July 8, 2008, Award, Judge Hursh found claimant developed Complex Regional Pain Syndrome (CRPS) as a consequence of her accident and that because of the CRPS claimant was incapable of performing substantial and gainful employment. Consequently, the Judge granted claimant permanent total disability benefits. The Judge, however, denied claimant's request for a cervical dorsal column stimulator, stating that if

circumstances changed the Workers Compensation Act provided for a post-award medical hearing.

Respondent contends Judge Hursh erred. Respondent argues: (1) claimant has not and cannot demonstrate by a preponderance of the evidence that her ankle injury caused her to be totally and completely disabled because CRPS (also known as Reflex Sympathetic Dystrophy or RSD) can be caused by many things (including a bug bite) and those other causes have not been ruled out; (2) claimant has not and cannot demonstrate by a preponderance of the evidence that her alleged CRPS caused her to be totally and completely disabled, where the severity of the syndrome cannot be accurately judged because of inconsistencies in claimant's complaints and actions; and (3) claimant quit an accommodated job that was within her work restrictions, she has not looked for work since, and, pursuant to K.S.A. 44-510e, she is precluded from receiving an award for permanent partial disability. In short, respondent contends the Award should be modified.

Conversely, claimant contends she is permanently and totally disabled as a result of the CRPS that developed following ankle surgery for her work-related accident and that a cervical dorsal column stimulator is needed to help control the pain above her waist and in her upper extremities. According to claimant, the issue of whether she is permanently and totally disabled comes down to whether one believes she is in the chronic and unrelenting pain that she claims. And she contends she should not be denied a cervical dorsal column stimulator for her upper extremity and torso pain merely because the stimulator for her lower extremity pain is not working as well as it did initially. Claimant maintains there are now better dorsal column stimulators on the market with newer technology that offer substantially more control and setting options. Consequently, claimant argues the Board should affirm the award of permanent total disability benefits and also authorize the cervical dorsal column stimulator.

In addition, while this appeal was pending before the Board, respondent requested permission to introduce additional evidence or, in the alternative, to have this claim remanded to the Judge to reopen the record.

The issues before the Board on this appeal are:

1. Should respondent be permitted to introduce additional evidence or, in the alternative, should this claim be remanded to the Judge for the taking of additional evidence?

2. What is the nature and extent of claimant's injury and disability?

3. Should claimant be authorized to receive a cervical dorsal column stimulator for the alleged pain she is experiencing in her upper extremities and torso?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant, who is now 54 years old, has the equivalent of a high school diploma from the Philippines. In June 2001, claimant began working in respondent's deli, preparing foods. And after approximately eight months she was promoted to the deli's production manager. Before beginning her employment with respondent, claimant worked approximately eight years in a school cafeteria where she cooked and served food.

While stocking supplies on June 16, 2002, claimant stepped from a pallet jack and rolled her left ankle. Claimant experienced severe pain in her left ankle and foot. After receiving claimant's accident report, respondent referred claimant to a doctor for treatment. But when conservative treatment did not resolve claimant's symptoms, the doctor referred claimant to Dr. Susan Bonar, a surgeon.

Claimant has received medical treatment from a number of physicians. The following summarizes some of that medical treatment and related evaluations and it is not intended to itemize all of the medical treatment claimant has received as a result of her left foot injury and the subsequent developments.

In December 2002, Dr. Bonar performed surgery on claimant's left foot. Following that surgery, claimant began experiencing sharp pain that went up into her left thigh. In 2003 claimant began seeing a pain management specialist, Dr. Chaplick, who diagnosed RSD (Reflex Sympathetic Dystrophy) and gave claimant three sympathetic nerve blocks. The doctor also recommended a dorsal column stimulator, which claimant initially declined. Claimant then saw Dr. Brian Jones, who also diagnosed RSD in claimant's left foot and ankle.[1] Respondent represents it paid Dr. Jones' charges as unauthorized medical expense.

In February 2004, claimant saw pain management doctors at Shawnee Mission Medical Center. After considering the treatment claimant had already received, those doctors told claimant they did not think they had any more treatment to offer and they recommended claimant see a pain management psychologist, Dr. Sabapathy. Claimant then saw Dr. Sabapathy two or three times and in June 2004 claimant saw Dr. Davis, a psychiatrist. Apparently, Dr. Sabapathy and Dr. Davis were unable to help claimant as

[1] R.H. Trans. at 87.

claimant's pain management treatment did not include any additional psychological or psychiatric treatment.

In August 2004 claimant saw Dr. Carabetta, who diagnosed left-sided RSD, rated claimant, and released her to return to work with restrictions. The doctor recommended that claimant be permitted to sit or stand as needed and he also restricted her from stooping and crouching. The doctor, however, believed claimant could occasionally lift up to 25 pounds and frequently lift up to 10 pounds.

Despite medical treatment claimant's pain did not resolve. Instead, the pain in claimant's left leg climbed higher up the leg, went into her waist, and down into the right leg. Claimant's authorized doctors eventually told claimant they could not help her. Accordingly, claimant sought treatment on her own and was referred by a Dr. Kloster to Dr. Eric P. Flores, a board-certified neurosurgeon. Dr. Kloster had performed a discogram and percutaneous disk procedure, which did not resolve claimant's pain.

Dr. Flores first saw claimant in January 2005. The doctor testified that claimant already had some left arm and trunk involvement at that time but most of her pain was in her back, hips, thighs, and legs. The doctor diagnosed RSD. After a trial with a dorsal column stimulator, the doctor implanted a permanent stimulator in early February 2005 for the pain in claimant's waist and legs. In September 2005 Dr. Flores moved the location of the electrode to provide better coverage.

Claimant continued working for respondent after her accident and surgeries. Indeed, she returned to work in the deli for a short period until she sustained another injury that resulted in another workers compensation claim, which the parties have settled.

In its attempts to accommodate claimant's CRPS symptoms, respondent placed claimant at its customer service desk. But that job required too much standing and claimant was then given a job taking orders for hams, turkeys, and other holiday foods. That job, however, was seasonal and claimant was then given a job handing out food samples.

By January 2006 Dr. Flores felt claimant was doing better as she was working eight hours per day and was able to dress and walk.[2] In late March 2006 claimant was evaluated at her attorney's request by Dr. Bernard M. Abrams, a board-certified neurologist. Dr. Abrams diagnosed CRPS Type 1 or RSD, which at that time was primarily affecting claimant's left arm and left leg. The doctor found claimant was probably at maximum medical improvement and rated her as having a 40 percent whole person

[2] Flores Depo. at 46.

impairment due to her pain and loss of activities of daily living, plus a 20 percent whole person impairment for sexual dysfunction. Dr. Abrams also thought claimant had signs of depression and agitation.

Claimant was then evaluated at respondent's request by Dr. Terrence Pratt, who saw claimant in August 2006 for the first of two examinations. Dr. Pratt, who is board-certified in physical medicine and rehabilitation, concluded claimant was at maximum medical improvement. Despite inconsistencies between the formal and informal assessments, the doctor also diagnosed CRPS. The doctor rated claimant as having a 24 percent whole person impairment under the AMA *Guides*.[3] The doctor arrived at the 24 percent whole person impairment rating by combining a 15 percent whole person impairment for the ankle-foot orthosis with a 15 percent whole person impairment for gait disturbance and a 10 percent whole person impairment for her upper extremity limitations.[4]

Dr. Pratt had no opinion whether claimant had an impairment for sexual dysfunction. Moreover, the doctor testified that some of his findings were inconsistent with some of those made by Dr. Abrams. Nonetheless, the doctor concluded claimant should have ongoing medical care related to her spinal cord stimulator and that her medications should be prescribed and controlled by a pain management specialist.

After the parties had obtained evaluations from their medical experts in 2006 and this claim appeared ready for conclusion, claimant's symptoms worsened. In early 2007 claimant returned to Dr. Flores with progressively worsening pain in her arms and torso. The doctor recommended a cervical dorsal column stimulator for the treatment of that pain. Since claimant's stimulator implant in February 2005, technology has vastly increased the options of the new stimulators as the new stimulators have approximately 5,000 different settings as compared to the 200 to 250 options of the older models.

Claimant was reluctant to try the new stimulator until her husband returned from Iraq, where he had been deployed. But once claimant was ready to proceed with the cervical dorsal column stimulator, respondent would not authorize the procedure.

Claimant continued to work for respondent until February 13, 2007. She testified she left respondent's employment because of her pain. Respondent has informed

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] Pratt Depo., Ex. 2 at 8.

claimant that accommodated work remains available.[5] Since leaving respondent's employment, claimant has neither worked nor sought any other employment.

In March 2007 Dr. Pratt saw claimant for the second and final time. Claimant advised the doctor that she had quit her job as a food demonstrator due to her pain. Dr. Pratt thought claimant had CRPS at least in her upper extremities and left lower extremity. The doctor did not modify the functional impairment rating that he had initially provided claimant nor change his initial opinion that claimant retained the ability to work.

In April 2007 claimant returned to Dr. Flores for the final time, which was the last time claimant received any treatment for her CRPS. Dr. Flores concluded claimant could not work at that time. The doctor also concluded claimant had CRPS in her left arm, both lower extremities, low back, pelvis, and part of her torso.

The next month, in late May 2007, claimant saw Dr. Steven L. Hendler at respondent's request. Dr. Hendler, who is board-certified in physical medicine and rehabilitation, testified claimant complained of symptoms in her back, torso and all four extremities. But the doctor determined those symptoms were diminished when she was distracted. Although claimant had been on more than 30 different medications in the past, she was not on any medications when he examined her.

Dr. Hendler, like Dr. Pratt, made some findings that were inconsistent with Dr. Abrams' findings. Moreover, Dr. Hendler testified claimant was wearing rings and stroking her hands, which he found inconsistent with claimant's alleged sensitivity to touch. Also like Dr. Pratt, Dr. Hendler found no discoloration, temperature change, or other findings indicative of CRPS. The only evidence of CRPS that Dr. Hendler found was in claimant's left lower extremity.

Claimant told Dr. Hendler she had quit work in February 2007 due to her pain, that she could not be touched, and that she was losing control of her hands. She also advised the doctor that she was depressed. But the doctor found no evidence of hand limitations and he did not perform a focused evaluation to assess her possible depression. The doctor found normal muscle tone and no wasting in claimant's upper extremities.

Dr. Hendler diagnosed limb pain with possible CRPS and left lower extremity pain associated with both a general medical condition and psychological factors. Regarding the latter, the doctor was comfortable with Dr. Sabapathy's evaluation and impression of dependent personality and some degree of psychological distress. Dr. Hendler did not rate claimant.

[5] R.H. Trans. at 100.

Dr. Hendler essentially agreed with Dr. Pratt's restrictions and concluded claimant could return to work by limiting her lifting to 10 to 15 pounds; limiting her pushing and pulling to 20 to 25 pounds; and avoiding prolonged standing and walking. In short, the doctor believed claimant could return to work.

At her attorney's request, claimant saw Dr. Abrams again in September 2007 for a second and final examination. Dr. Abrams found claimant's left arm and left leg were cold and displayed livedo reticularis (rash). Using the *Guides* the doctor rated claimant as having a 15 percent whole person impairment for the left ankle brace, a 15 percent whole person impairment for depression, a 10 percent whole person impairment for upper extremity involvement, a 19 percent whole person impairment for gait difficulty, and a 10 percent whole person impairment for sexual dysfunction.[6] Using the *Guides* combined values chart, the doctor determined claimant had sustained a 52 percent whole person impairment.[7]

At her March 2008 regular hearing, claimant testified she had pain in her hips, up the left leg, across her waist, down the right leg, into her back, shoulder blades, neck, back of her ears, arms and hands.[8] She also testified she had problems sleeping due to her pain and that the medication she was given to help her sleep made her dizzy. Moreover, claimant testified that she could not drive at all because of the intense pain she experienced from her foot to her groin when she pushed down with her foot.[9] According to claimant, she has not driven since February 2007. She also testified that she is unable to cook, that she no longer showers because the water hurts, that she is unable to launder clothes, and that she cannot vacuum because of the sound. Moreover, claimant testified she primarily stays on the ground floor of her home, but when she goes to the basement she goes down slowly using her buttocks and then ascends the stairs by crawling.[10]

At the regular hearing claimant also indicated she believed the dorsal column stimulator that Dr. Flores implanted "help[ed] a little" as it covered or masked the pain.[11] Consequently, claimant requested authorization for a cervical dorsal column stimulator for her upper extremities as she would be thankful for even the smallest pain relief.

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[6] Abrams Depo., Ex. 4 at 3.

[7] *Id.*, at 91.

[8] R.H. Trans. at 45-47.

[9] *Id.* at 49, 50.

[10] *Id.* at 73, 74.

[11] *Id.* at 70.

1. Should respondent be permitted to introduce additional evidence or, in the alternative, should this claim be remanded to the Judge for the taking of additional evidence?

Respondent has requested leave to supplement the evidentiary record by introducing evidence regarding certain events that have occurred after the parties submitted this claim to the Judge for decision. Specifically, respondent desires to introduce evidence that claimant has renewed her driver's license. Respondent argues that evidence is important as there is a question regarding claimant's ability to drive and her credibility.

Claimant testified she did not drive any more as she had quit driving in February 2007 due to her symptoms. And claimant described a specific incident where she pulled over to the side of the road due to her symptoms. Other testimony concerning claimant's ability to drive came from her husband, Timothy Connole, who stated that claimant no longer drives. Dr. Abrams testified that claimant should not drive when taking medication. And Dr. Flores did not specifically address claimant's ability to drive but he did indicate that her activities would be dictated by her pain. Michael J. Dreiling, respondent's vocational expert, testified that claimant had told him that others drove her to work due to her pain.

Respondent requests to introduce evidence that claimant has recently renewed her driver's license. Conversely, claimant argues that if respondent's request is granted she should be permitted an opportunity to present evidence regarding the license renewal and how it does not cast doubt upon her credibility and earlier testimony.

Under K.S.A. 44-528 the parties have the right to request review and modification of an award. Considering the parties have that option, the Board is not persuaded there is good cause at this juncture to reopen the record for evidence that did not exist when the parties' terminal dates expired. Indeed, the proffered evidence did not exist until after respondent's attorney had obtained a continuance (for medical reasons) of the oral argument that was initially scheduled before the Board.

The Board concludes respondent's request to either supplement the record or for the Board to remand this claim to the Judge for taking additional evidence should be denied.

2. What is the extent of claimant's injury and disability?

The Board concludes claimant developed CRPS as a direct result of her June 16, 2002, left ankle injury and subsequent left ankle surgery. Medical science has not determined why CRPS develops. But it is not uncommon for CRPS to develop following a traumatic injury or surgery. In addition, there may also be a psychological component

to the syndrome as Dr. Hendler testified the literature suggests a predisposition in some people with certain psychological makeup. Dr. Sabapathy's records included findings that would suggest claimant is one of those people. The doctors also generally agree the symptoms from CRPS may wax and wane and vary from day to day. Moreover, CRPS can affect a person's ability to work, depending upon how bad the syndrome becomes.

None of the doctors who testified indicated claimant's CRPS developed for any reason other than her left ankle injury or surgery. Conversely, respondent's medical expert, Dr. Pratt, wrote on page 8 of his August 16, 2006, report to respondent's attorney, "The development of the apparent complex regional pain syndrome *relates directly* to her reported vocationally related event in relationship to the left lower extremity involvement."[12] And respondent's other medical expert, Dr. Hendler, testified that he regularly sees one or two new patients per month for CRPS or RSD, with the vast majority having developed their CRPS as a result of an injury that occurred at work.[13]

According to Dr. Flores, a person with CRPS will generally relate that everything causes pain including sleeping, housework, and stress. The doctor also explained the syndrome or condition is relentless and absolute torture. Over the period that Dr. Flores treated claimant, the doctor never observed claimant exhibit inconsistent pain behavior. The doctor did not place individual restrictions on claimant as she was already restricted by her pain. And when Dr. Flores last saw claimant in April 2007, the doctor believed her pain prevented her from working.

Dr. Abrams, who last saw claimant in September 2007, also concluded claimant could not compete in the open labor market. The doctor, who had found objective findings of pain, concluded claimant's pain was too much for her to compete in the labor market. He also felt it was highly doubtful that future medical care would return claimant to gainful employment.

Dr. Abrams testified claimant could not stand for any prolonged period and if she sat she would have to move around. In addition, the doctor concluded claimant should not be touched on the left side of her body, that she should not pick up or carry more than 5 to 10 pounds, and that when taking medications she should neither drive nor do any mental task where the results were crucial. Dr. Abrams concluded claimant was unable to perform any of her former work tasks from her deli job with respondent or her earlier job in a school cafeteria. In short, the doctor determined claimant had a 100 percent task loss.

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[12] Pratt Depo., Ex. 2 (emphasis added).

[13] Hendler Depo. at 5, 6.

Dr. Pratt recommended that claimant be restricted from lifting greater than 10 to 15 pounds, pushing or pulling 20 to 25 pounds, prolonged standing and walking, and overhead activities. And Dr. Hendler generally agreed with those restrictions. Both Dr. Pratt and Dr. Hendler believed claimant could return to work. Nonetheless, Dr. Pratt indicated claimant had a 90 to 92 percent task loss when considering her former work tasks in respondent's deli and in the school cafeteria.

The evidence establishes that claimant has CRPS symptoms to a varying extent in both upper and both lower extremities, into her torso, and up towards her neck. Because of the nature of claimant's injuries, *Casco*[14] creates a presumption of permanent total disability.

In *Casco*, the Kansas Supreme Court considered whether an individual who sustained bilateral shoulder injuries was entitled to compensation for two separate scheduled injuries under K.S.A. 44-510d or as a nonscheduled whole body injury under K.S.A. 44-510e. After examining the applicable statutes and the relevant case law, the *Casco* Court departed from the well-recognized and long-established case law going back over 75 years. In doing so, it provided certain rules, which are as follows:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.

[14] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[15]

In summary, scheduled injuries are the rule, while nonscheduled injuries are the exception.[16] When a worker's injury involves both eyes, hands, arms, feet, legs, or any combination, there is a presumption that the worker is permanently and totally disabled. But that presumption can be rebutted by evidence that the worker is capable of engaging in some type of substantial gainful employment.[17]

The presumption of permanent total disability exists in this claim. And the Board finds respondent has failed to overcome that presumption. When considering the entire record, the opinions of Dr. Pratt and Dr. Hendler that claimant retains the ability to work are not persuasive.

Moreover, the greater weight of the evidence establishes that claimant is essentially and realistically unemployable and, therefore, entitled to receive permanent total disability benefits.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. But the Kansas Court of Appeals in *Wardlow*[18] held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

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[15] *Id.*, Syl. ¶s 7-10.

[16] *Id.*, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[17] *Casco*, 283 Kan. 508,Syl. ¶ 9.

[18] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

In *Wardlow*, the injured worker, a former truck driver, was physically impaired and lacked transferrable job skills, making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court in *Wardlow* looked at all the circumstances surrounding Mr. Wardlow's condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether Mr. Wardlow was permanently and totally disabled.

As indicated by Dr. Flores, CRPS is a relentless and torturous syndrome characterized by pain. Claimant's testimony is persuasive that her symptoms progressively worsened to the point she could no longer tolerate working and could no longer perform the rather innocuous task of handing out food samples.

Likewise, the testimony from the vocational rehabilitation experts, Terry L. Cordray and Michael J. Dreiling, establish that it is highly unlikely that anyone other than respondent would hire claimant. Respondent's expert, Mr. Dreiling, testified in part:

> Q. (Mr. Manson) Let me ask you this. Other than this accommodated position [with respondent], there's a good chance, probably maybe a 100 percent chance, that no other employer would give her a job in the open labor market, true?
>
> MR. LUTZ: I'm going to object to the question, Bill, because you're not -- are you asking based on which doctor?
>
> MR. MANSON: Doesn't make a difference. He's a vocational expert. He's testified that she can do this work in the open labor market and I'm suggesting that other than this accommodated position that we're talking about, that there is no other type of job in the open labor market that could make these accommodations.
>
> Q. (By Mr. Manson) Nobody would hire her, true?
>
> A. Realistically, are you talking about someone going out and competing for this type of job who tells an employer about their medical problems and their pain problems? If she leaves this job and quits and tries to go out and get this job elsewhere, she's going to have difficulty. It's highly unlikely that someone is going to hire her with her presentation.
>
> Q. Pretty close to 100 percent if not 100 percent unlikely she'd ever be able to get a job in the open labor market from another employer, true?

A. The way she would present, true.[19]

In short, the Board finds that claimant is unable to return to work and perform substantial, gainful employment until such time as her pain is controlled. In the vernacular of *Wardlow*, claimant is essentially and realistically unemployable. And that is due to her relentless pain. Consequently, claimant is entitled to receive permanent total disability benefits commencing February 13, 2007, when she left her accommodated job.

Respondent's efforts to accommodate claimant are commendable. Indeed, those efforts kept claimant employed until February 13, 2007. Accordingly, except for those periods of temporary disability, from the date of accident of June 16, 2002, through February 12, 2007, claimant is entitled to receive permanent partial disability benefits based upon her functional impairment rating. The Board averages the 24 percent and 52 percent whole person functional impairment ratings provided by Dr. Pratt and Dr. Abrams, respectively, and finds that claimant had a 38 percent permanent partial disability for the period until February 13, 2007, when she left work.

3. Should claimant be authorized to receive a cervical dorsal column stimulator for the alleged pain she is experiencing in her upper extremities and torso?

Dr. Flores recommended the cervical dorsal column stimulator to address the pain claimant was experiencing in her upper extremities and torso. Dr. Flores is hopeful the new stimulators, having approximately 5,000 settings, will reduce claimant's pain. Dr. Abrams agreed with Dr. Flores that claimant should try the cervical stimulator.

Conversely, Dr. Hendler did not believe the cervical stimulator was warranted based upon claimant's presentation and her response to the previous stimulator. Finally, Dr. Pratt did not have an opinion regarding the stimulator as his opinion would depend upon a psychological assessment.

The Workers Compensation Act requires an employer to provide an injured worker with medical treatment and such items that are reasonably necessary to cure and relieve the worker from the effects of the injury.

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in

[19] Dreiling Depo. at 45-46.

> accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.[20]

Whether or not an item or device cures or relieves an injured worker from the effects of an injury is a question of fact and must be determined on a case-by-case basis.

Claimant's first stimulator, which was an older model with limited settings, initially helped ease the pain in her lower extremities. At one time claimant believed the stimulator had lost its effectiveness. But at the same time claimant's daughter was telling Dr. Flores that the stimulator was actually helping as claimant experienced severe pain when the unit was turned off. Moreover, claimant's belief that the stimulator was not helping must be considered in context. At that time claimant's symptoms were spreading and worsening in her upper extremities and trunk. In addition, claimant later testified how she believed the stimulator had helped mask her pain. In short, the first stimulator eased the pain in her lower extremities although claimant perceived it was most effective when initially inserted.

Claimant now experiences pain in her upper extremities and torso that might be eased by a cervical dorsal column stimulator. The Board finds claimant's request for a cervical dorsal column stimulator is reasonable and should be granted. Additionally, the Board appoints Dr. Eric P. Flores as the authorized physician to provide claimant with future medical treatment, including the cervical dorsal column stimulator, should the doctor continue to recommend such a device.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[21] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board finds that claimant is entitled to receive permanent total disability benefits, which commence February 13, 2007; the Board grants claimant permanent partial disability benefits for a 38 percent whole person impairment from the date of accident until February 13, 2007, except for any period during which claimant was

[20] K.S.A. 44-510h(a).

[21] K.S.A. 2008 Supp. 44-555c(k).

temporarily and totally disabled or temporarily and partially disabled;[22] and the Board appoints Dr. Eric P. Flores as the authorized physician to provide claimant with future medical treatment, including a cervical dorsal column stimulator, should the doctor continue to recommend such a device.

Ligaya Connole is granted compensation from Four B Corporation d/b/a Hen House Market for a June 16, 2002, accident and resulting disability. Based upon an average weekly wage of $452.68, Ms. Connole is entitled to receive the following disability benefits:

Ms. Connole is entitled to receive 34.43 weeks[23] of temporary total disability benefits, plus $442.59 in temporary partial disability benefits, plus 149.76 weeks of permanent partial disability benefits for a 38 percent permanent partial disability, and commencing February 13, 2007, 228.53 weeks of permanent total disability benefits. The total award is not to exceed $125,000.

As of February 20, 2009, Ms. Connole is entitled to receive 34.43 weeks of temporary total disability benefits at $301.80 per week, or $10,390.97, plus $442.59 in temporary partial disability benefits, plus 149.76 weeks of permanent partial disability benefits at $301.80 per week, or $45,197.57, for a 38 percent permanent partial disability, plus 105.57 weeks of permanent total disability benefits at $301.80 per week, or $31,861.03, for a total due and owing of $87,892.16, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $37,107.84 shall be paid at $301.80 per week until paid or until further order of the director.

The Board adopts the Judge's findings and remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[22] The parties indicated at oral argument that temporary total disability benefits were not an issue and that they had stipulated to the appropriate number of weeks. The Judge listed in his stipulations that respondent had paid 43.57 weeks of temporary total disability benefits totaling $13,213.74 and a total of $442.59 in temporary partial disability benefits.

[23] As claimant is entitled to receive permanent total disability benefits beginning February 13, 2007, the weeks of temporary total disability benefits after that date (9.14 weeks) are now weeks paid as permanent total disability benefits. Therefore, after reducing 43.57 weeks by 9.14 weeks, claimant is entitled to receive 34.43 weeks of temporary total disability benefits, which shall be used in computing claimant's award of disability benefits. See footnote 22 above and R.H. Trans. at 5, 6.

Dated this ____ day of February, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William G. Manson, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge